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Supreme Court, U.S.
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CASE NO.

In the Supreme Court of the United States

October Term, 1990

ANNA LOU STUCKEY

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ADORNO & ZEDER, P.A.
FRED A. SCHWARTZ
2601 South Bayshore Drive
Suite 1600
Miami, Florida 33133
(305) 858-5555

QUESTION PRESENTED FOR REVIEW

Whether the trial court's disqualification of Petitioner's lead counsel violated Petitioner's Sixth Amendment rights where the trial court did not disqualify other counsel who had at least as great a potential for conflict and where the trial court did not allow Petitioner an opportunity to waive any potential conflict.

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ORDER BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the Petitioner's conviction and held that the trial court did not violate Petitioner's Sixth Amendment rights by disqualifying Petitioner's lead counsel. The opinion of the Eleventh Circuit and the District Court order are reprinted in the appendix. The Eleventh Circuit opinion is published at 917 F.2d 1537 (11th Cir. 1990).

JURISDICTION

This Petition arises from a criminal indictment filed against STUCKEY in the District Court for the Middle District of Georgia (Macon Division). The indictment charged STUCKEY with violating 21 U.S.C. §§ 841(a)(1) and 846 and 18 U.S.C. §§ 1952 and 2.

STUCKEY was convicted of all counts. She appealed the judgment of conviction to the United States Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291.

On October 19, 1990, the Court of Appeals for the Eleventh Circuit issued an opinion affirming STUCKEY's conviction. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL PROVISION

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CASE NO.

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ANNA LOU STUCKEY[1]

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Anna Lou Stuckey ("STUCKEY"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

[1]STUCKEY and the Government were the only parties to the appeal below. The only other defendant named in the indictment was Gary Bernard White.

STATEMENT OF THE CASE

A grand jury sitting in the Middle District of Georgia (Macon Division) indicted STUCKEY and co-defendant Gary Bernard White on January 25, 1989, in a three-count indictment that charged both defendants with possession of cocaine with intent to distribute, conspiracy to possess cocaine with intent to distribute, and a Travel Act violation. STUCKEY was arraigned on February 1, 1989 and pled not guilty. She was represented by Richard A. Coleman, Esq., an attorney from Atlanta, Georgia.

On March 3, 1989, Fred A. Schwartz, Esq., an attorney practicing in Miami, Florida, filed a notice of appearance as co-counsel for STUCKEY, and moved for leave to appear *pro hac vice*.[2] That same day, Chief Judge Wilbur D. Owens held a hearing on unrelated motions. Though Fred Schwartz was not present at the hearing, the matter of his appearance was brought to Judge Owens's attention. Judge Owens allowed the appearance on the condition that it not delay the trial, which was scheduled to begin on March 20.

In the late afternoon of March 16, the Government filed a motion for an emergency hearing to determine the source and amount of fees paid to the defendants' attorneys, and to determine whether a potential conflict of interest existed. The motion was based on information obtained from DEA Agents during conversations with both co-defendant White and his attorney, David Botts (also from Atlanta, Georgia), that a third party had paid Botts's fee.

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[2]Schwartz has extensive federal criminal trial experience. He was a prosecutor for fifteen years, including five years as deputy chief of the Miami office of the U.S. Justice Department Organized Crime Strike Force, and had been a criminal defense attorney for six years when he entered his appearance.

The following day, Friday, March 17, only three days before the trial, Judge Owens held a series of conferences in his chambers on the Government's motion. The first occurred at 9:00 a.m. Present were David Botts and Judge Owens. Judge Owens asked Botts about the circumstances under which he was hired to represent White. Botts responded that Richard Coleman (who until sometime in the recent past had been Botts's law clerk) asked him to represent White for a fee of $25,000. Coleman initially paid Botts $10,000. Fred Schwartz subsequently transmitted to Botts $5,000. The final payment of $10,000 came from a man by the name of Mr. Brown who paid Botts in cash at Botts's office. Judge Owens excused Botts, and Coleman entered the judge's chambers.

Judge Owens made the same inquiry of Coleman. Coleman said he had been hired by a friend of the family to represent STUCKEY. The man who hired Coleman gave him $9,300, and gave him another $10,000 for Botts.

Judge Owens then met with White alone, and advised him of the potential conflict of interest. White said he was "very confident with Mr. Botts' representation," and he thought Botts had looked after his best interests "wholly and totally." Judge Owens excused White and called in STUCKEY.

STUCKEY immediately requested the presence of her attorney. Judge Owens denied her request. He advised STUCKEY of the law concerning conflicts of interest, then told her that he knew that someone other than she had selected Coleman and paid him. He advised STUCKEY that if she thought there was even a possibility that Coleman was not looking after her interests, he would appoint her new counsel. STUCKEY responded, "Right now, I'd like to keep him because he's familiar with me and my case."

Following his conference with STUCKEY, Judge Owens called Botts, Coleman and the prosecutors into his chambers and stated:

> From what I am told by you gentlemen and by each defendant, I do not perceive at the moment any necessity for the Court to relieve you gentlemen of representing either defendant or making any change.

The trial judge then proceeded to express his thoughts on the subjects of money, and attorneys, from South Florida:

> THE COURT: . . . It smells when cash appears from Southern Florida everytime [sic] somebody's arrested and every defendant says, 'I am indigent.' The last case I tried like this was in Valdosta. We had three Miami, Florida lawyers come up, went through the motions of a trial, got to the end of the trial, they were convicted, evidence was just cold turkey, wasn't any question about it. As soon as they were sentenced, they said, 'We've done all we were paid to do.' Now, they moved to appeal in forma pauperis. That's the pattern that's going on.
>
> MR. COLEMAN: Well, I was retained in Atlanta, Your Honor.
>
> THE COURT: I'm not saying — I'm not making any findings in this case at all; all I'm saying is that as much as you dislike the allegation, in my best judgment, it's a legitimate point of inquiry. Obviously, the money in question is coming from South Florida.
>
> MR. COLEMAN: I was retained in Atlanta, Your Honor.

THE COURT: Where is Mr. Schwartz from?

MR. COLEMAN: He's from South Florida, I gather.

After lunch, Judge Owens called Fred Schwartz in Miami. Judge Owens told Schwartz that because Schwartz transmitted money to Botts, the judge would have to disqualify him. Schwartz described what happened: After STUCKEY's arrest, Schwartz went to Georgia to see Coleman about being STUCKEY's lead counsel. (Coleman had already hired Botts to represent White.) Coleman introduced Schwartz to Botts. Botts told Schwartz he had only been paid part of his fee. When Schwartz returned to Miami, the man who hired Schwartz paid him a portion of his fee, and wanted to give Schwartz $5,000 to transmit to Botts. Schwartz initially declined, but then agreed to the accommodation, took the $5,000 and mailed Botts a check for that amount. In his cover letter to Botts, Schwartz stated, in part, as follows: "Enclosed is my check for $5,000. Of course, you will exercise totally independent judgment in your representation of Mr. White."

Schwartz told Judge Owens that at no time did he ever tell Botts how to represent White. Schwartz also told Judge Owens that he perceived no conflict:

> So, I understand Your Honor's position, but I have really had nothing that I see that puts me in a situation of conflict other than, I hate to use this word because it has negative connotations, but being a conduit and making it clear to Mr. Botts that my role as a conduit was not in any way to influence his representation of White.

As soon as Schwartz completed his explanation, Judge Owens said he recognized a potential for conflict. Schwartz

asked Judge Owens to speak with the defendants to see whether they thought there was a conflict. Judge Owens responded that STUCKEY had adequate representation with Coleman. He told Schwartz that he was disqualifying him. He subsequently entered a written order of disqualification (See Appendix).

At 4:30 p.m., Judge Owens met with STUCKEY. He told her that he had disqualified Schwartz and then asked about her initial contact with Schwartz. STUCKEY again expressed concern about speaking to the judge without an attorney.

The judge met with Coleman at about 5:00 p.m. Coleman advised that Schwartz was to have been lead counsel. Coleman was not prepared to try the case. He requested a continuance of one week to facilitate his presentation of evidentiary objections. (Coleman was a young attorney who had primarily state court experience and had no expertise in drug cases.) Judge Owens refused to postpone the trial.

Trial began against STUCKEY the following Monday morning, March 20, as scheduled. (White elected to change his plea to guilty to all three counts.) On March 22, the jury found STUCKEY guilty as charged.

REASONS FOR ALLOWANCE OF WRIT

This Court should grant this Petition because, as demonstrated below, the Eleventh Circuit Court of Appeals has sanctioned so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Petitioner submits the following argument in support of her Petition.

ARGUMENT

The Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The right to counsel guarantees a defendant in a criminal case the right to be represented by the counsel of his choice. *United States v. Glasser,* 319 U.S. 60, 70 (1942). This right of counsel of one's choice is a qualified right that must yield to the overriding guarantee of the Sixth Amendment of the right to effective assistance of counsel; "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will be represented by the lawyer whom he prefers." *Wheat v. United States,* 486 U.S. 153, 159 (1988). Nevertheless, there exists a presumption in favor of counsel of choice. *Id.,* at 160; *United States v. Panzardi Alvarez,* 816 F.2d 813, 816 (1st Cir. 1987) (The Sixth Amendment requires "courts to pay considerable deference to a criminal defendant's actual choice of counsel.") An arbitrary disqualification of a defendant's counsel of choice violates his right to counsel. *United States v. Laura,* 607 F.2d 52, 56 (3d Cir. 1979); *see also, In re Grand Jury Subpoena Served upon Doe,* 781 F.2d 238, 250 (2nd Cir.) (*en banc*), *cert. denied,* 475 U.S. 1108 (1986).

Judge Owens's disqualification of Schwartz was arbitrary. Judge Owens, for his own personal prejudices, chose to single out Fred Schwartz for disqualification. If there was a potential for conflict of interest with Schwartz, there was at least as great, if not a greater, potential for conflict with Coleman. Schwartz was merely a conduit who transmitted $5000 to Botts — the second installment on Botts' fee. Coleman, on the other hand, was the person who retained Botts to represent White. Coleman paid him his initial fee of $10,000 — twice the amount that Schwartz forwarded to Botts. Coleman also had a close relationship

with Botts, having recently clerked for him, and practiced in the same community. Therefore, if a conflict did exist, Coleman would be better situated than Schwartz to exercise control over Botts.

Botts also would have as much potential for conflict as Schwartz. If a conflict in fact existed as to Schwartz, then Botts would have been the servant of many masters. He would have been answerable to White, his client; Coleman, who hired him; Schwartz, who forwarded a portion of his fee; and Mr. Brown, who paid the balance of his fee.

Judge Owens did not disqualify Coleman or Botts. He listened to them, spoke to their clients, and gave their clients an opportunity to waive any potential conflicts — which they did. The judge then accepted the waivers. The matter should have ended there. It did not.

Having just pontificated on the evils of money from South Florida, and with his prior bad experience with South Florida attorneys fresh in his mind, Judge Owens returned from lunch and took it upon himself to call Schwartz. Unlike his treatment of Coleman and Botts, Judge Owens immediately said he would have to disqualify Schwartz. Schwartz attempted to explain that he saw no potential for conflict; that at most he was acting as a conduit for the payment of a portion of Botts' fee. The defendant's attorney is in the best position professionally and ethically to determine whether a conflict exists or may develop. *Holloway v. United States,* 435 U.S. 475, 485 (1978). Nevertheless, Judge Owens ignored Schwartz's comments and disqualified him.

STUCKEY had the right to waive any potential conflict. *United States v. Reese,* 699 F.2d 803, 805 (6th Cir. 1983); *United States v. Cunningham,* 672 F.2d 1064, 1073 (2d Cir. 1982), *cert. denied,* 461 U.S. 951 (1984); *United States v.*

Garcia, 517 F.2d 272, 276 (5th Cir. 1975). Though he allowed the defendants to waive any potential conflicts as to Coleman and Botts, the disqualification of Schwartz was a *fait accompli* when Judge Owens met with STUCKEY the second time. He deprived her of the right to have counsel present both times he met with her (both at critical stages of the proceedings), thus compounding the Sixth Amendment violation. Rule 44(a), Fed.R.Crim.P.; *Gideon v. Wainwright*, 372 U.S. 335 (1963). He advised her of what he had done, and she was helpless to change the outcome.

The judge's disparate treatment of Schwartz, viewed in the light of the judge's comments about South Florida, reveals that the judge believed Schwartz was somehow more tainted than the two local attorneys. Judge Owens had no proof of this, but was acting on his personal beliefs. Schwartz was thus not disqualified on the basis of a potential conflict; he was disqualified on the basis of Judge Owens' enunciated prejudices against South Florida attorneys.

The arbitrary disqualification of STUCKEY's experienced lead counsel left STUCKEY with an unprepared neophyte who had only the weekend to prepare for trial. The evidence in this case was not "cold turkey," as Judge Owens described a previous case. Here the government had a weak case based significantly on hearsay to which, as the Eleventh Circuit noted, Coleman neglected to request an immediate limiting instruction (App. 4). The end result was a conviction in two days. This was an unprecedented denial of a defendant's Sixth Amendment rights. This Court should exercise its power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

FRED A. SCHWARTZ
ADORNO & ZEDER, P.A.
2601 S. Bayshore Drive
Suite 1600
Miami, Florida 33133
(305) 858-5555

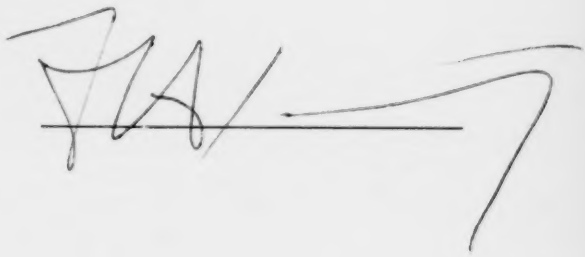
Attorneys for Petitioner
Anna Lou Stuckey

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Petition for Writ of Certiorari was served by mail this 16th day of January, 1991 upon:

Deborah A. Griffin
P.O. Box U
Macon, Georgia 31202

Solicitor General
Department of Justice
Washington D.C. 20530



Appendix

APPENDIX

UNITED STATES of America,

Plaintiff-Appellee,

v.

Anna Lou STUCKEY, a/k/a Clara Davis,

Defendant-Appellant.

Nos. 89-8268 and 89-8449
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Oct. 19, 1990.

Defendant was convicted in the United States District Court for the Middle District of Georgia, No. CR89-9-MAC (WDO), Wilbur D. Owens, Jr., Chief Judge, on charges of conspiracy to possess with intent to distribute cocaine, aiding and abetting possession with intent to distribute cocaine, and aiding and abetting travel in interstate commerce in aid of racketeering, and defendant appealed. The Court of Appeals held that: (1) evidence was sufficient to sustain conviction, and (2) defendant's Sixth Amendment rights were not violated by trial court's disqualification of defendant's cocounsel.

Affirmed.

1. Conspiracy —47(12)

Drugs and Narcotics —123(2)

Racketeer Influenced and Corrupt Organizations —121

Evidence was sufficient to sustain conviction for conspiracy to possess cocaine with intent to distribute, aiding and abetting possession with intent to distribute cocaine and aiding and abetting travel in interstate commerce in aid of racketeering; 55 packages, each containing kilogram of cocaine, were discovered in secret compartment of vehicle at time defendant was apprehended and there was evidence that defendant and codefendant had made several trips from Georgia to Florida during preceding seven months.

2. Criminal Law —1038.3

Trial court did not commit plain error in failing to give limiting instruction on its own initiative as to purpose of impeachment testimony in drug trial.

3. Criminal Law —641.1

Sixth Amendment right to counsel does not give accused right to subvert judicial process. U.S.C.A. Const.Amend. 6.

4. Criminal Law —641.5, 641.5(7)

Defendant's Sixth Amendment right to counsel was not violated by judge's disqualification of attorney who had filed appearance in case as cocounsel for defendant or in refusing to let defendant waive conflict manifest in disqualified attorney's allegiance to person who hired him to represent defendant; defendant stated that she wanted to keep original counsel who had not been disqualified. U.S.C.A. Const.Amend. 6.

Appeals from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, Chief Judge, FAY and COX, Circuit Judges.

PER CURIAM:

Anna Lou Stuckey appeals from her convictions at the hands of a jury for conspiracy to possess with intent to distribute cocaine (count one); for aiding and abetting the possession with intent to distribute cocaine (count two); and for aiding and abetting travel in interstate commerce in aid of racketeering (count three). She raises three arguments for reversal: (1) the evidence was insufficient to convict; (2) the district court erred in failing to instruct the jury that an out-of-court statement used to impeach a witness could not be considered to prove the truth of its contents; and (3) the district court erred in disqualifying appellant's "primary" trial counsel (purportedly Fred A. Schwartz) and requiring her to proceed to trial with "local" trial counsel (Richard A. Coleman). Finding no merit in any of these arguments, we affirm.

[1] From the evidence adduced at trial, viewed in the light most favorable to the Government, the jury could find that appellant and Gary Bernard White, her codefendant, who pled guilty to all three counts of the indictment, were engaged in the business of hauling substantial amounts of cocaine from south Florida to Atlanta, Georgia for a drug-trafficking syndicate. They were caught when, on January 19, 1989, during one of their trips from south Florida to Atlanta, the Georgia Highway Patrol stopped their van on I-75 in Houston County, Georgia and found fifty-five packages, each containing a kilogram of cocaine, hidden in a secret compartment under the rear deck of the vehicle. Given the other tangible evidence the police seized from appellant and White on that occasion, which indicated that appellant and White had made several brief trips from Atlanta to Miami and back to Atlanta during the preceding

seven months, a reasonable jury could readily find appellant guilty as charged in the indictment. We therefore reject her first ground for reversal.

[2] Appellant's second argument deals with the trial judge's handling of an out-of-court statement the Government introduced to impeach a witness. She says that the judge erred in failing to give the jury a limiting instruction as to the purpose of the testimony, although she did not request one. As the Government notes in its brief, the court, in its charge to the jury at the conclusion of the trial, properly instructed the jury on the use it could make of impeachment testimony, and thereafter, in arguing the case to the jury, the prosecutor did not circumvent that instruction by urging the jury to accept such testimony as proof of its factual recitations. The question, therefore, boils down to this: Did the trial judge commit plain error in failing to give a limiting instruction on his own initiative when the impeaching testimony came before the jury? The answer, obviously, is no. There being no merit in appellant's second argument, we turn to her third, and final, point concerning the court's disqualification of the lawyer who, she represents, was supposed to act as her lead counsel at trial.

After discovering the cocaine in the secret compartment of the van, the Georgia Highway Patrol took appellant and White into custody and turned them over to agents of the federal Drug Enforcement Administration (DEA) in Macon, Georgia. The DEA thereafter filed a criminal complaint against appellant and White, and, four days later, a federal magistrate in Macon held a hearing to determine whether there was probable cause to bind appellant and White over to the grand jury and to detain them in the interim. At the hearing, Richard A. Coleman, an Atlanta lawyer, represented appellant; David Botts, an attorney also from Atlanta, represented White. Coleman, in response to the magistrate's inquiry as to whether he was appellant's lawyer,

stated that he was. Botts told the court that he was White's lawyer.

The magistrate found probable cause and ordered appellant and White detained. Two days later, on January 25, the grand jury returned the instant indictment. The defendants were arraigned on February 1, and on February 10, Coleman moved the court to admit appellant to bail. The court denied his motion, and appellant remained in custody. Coleman also moved the court, on February 10, to suppress the evidence seized at the time of appellant's and White's arrests, and to grant the defendants separate trials. (Botts, in behalf of White, also moved to suppress this evidence, but he did not join in Coleman's motion for separate trials.) Separate trials were necessary, Coleman represented to the court, so that the defendants could testify and exculpate one another. According to Coleman, appellant contemplated taking the stand in White's defense and White planned to take the stand in her defense; the defendants would not testify, however, if they were tried together.

On March 3, Fred A. Schwartz, an attorney practicing in Miami, Florida, filed a notice of appearance "as co-counsel" for appellant. In his notice, he stated that he "agrees to represent [appellant] for proceedings arising out of the transaction with which [appellant] is presently charged in the United States District Court in and for the Middle District of Georgia."[1] That same day, Chief Judge Wilbur D. Owens, Jr., heard appellant's and White's motions to suppress. Schwartz did not appear for the hearing; rather, Coleman, alone, appeared for appellant. Botts appeared for White. At the end of the hearing—after the court had heard the evidence and argument of counsel—the prosecutor,

[1]At the same time, on March 3, Coleman and Schwartz filed a "Motion to Appear Pro Hoc Vice," in which they represented that appellant wished Schwartz to appear in the case as her co-counsel, along with Coleman.

Deborah G. Fowler, announced: "Briefly, we'd like to bring one other matter to the court's attention, we were *handed this morning* a Notice to Appear of a Fred Schwartz of Miami and of course, this case is set [for trial] for March 20th and we would just like to request that if he is admitted to join in counsel for [appellant] that that not . . . delay . . . the trial of this matter." (In the certificate of service attached to the Notice of Appearance he filed on March 3, Schwartz stated that he had *mailed* the Notice of Appearance to the prosecutor, and Coleman and Botts, *on February 21.*) On hearing this statement from the prosecutor, Judge Owens engaged in the following colloquy with Coleman:

> THE COURT: What is the situation there, Mr. Coleman?
>
> MR. COLEMAN: Well, Your Honor, he has been associated with myself in this matter. I will—I guess we'll decide who will be lead counsel in that regard. I do not believe he has any conflicts and it is my understanding he does have no conflicts with the March 20th trial date and I believe that there will be no problem or conflict in him appearing. I have left a copy of [Schwartz' Notice of Appearance] with the Court as well with the Bailiff in front of you, Your Honor. I'd like to point out though, by mistake, one of the—the one filed with the Court said that they were served on the 21st [of February]; they were not served on the 21st, they were both served on Ms. Fowler [the prosecutor] today by myself and for the record, I'd just like to correct that misnomer. I've corrected that on your copy but it's not corrected on the Clerk's Office copy and for the record, I'd like to state that. . . .
>
> . . . .

THE COURT: And I will allow Mr. Schwartz to appear provided that his appearing does not delay the trial of the case. Will you so communicate with him?

MR. COLEMAN: I will, Your Honor. Will the Court be entering an order in that regard or shall I prepare one for the Court?

THE COURT: We routinely do not enter orders for that purpose.

MR. COLEMAN: I will communicate that to Mr. Schwartz, Your Honor.

On March 6, Judge Owens' magistrate denied appellant's motion for separate trials; on March 14, Judge Owens denied appellant's motion to suppress (and White's motion as well). The next day, White appeared before Judge Owens and pled guilty to the first count of the indictment pursuant to a plea agreement which called for him to cooperate with the Government and to testify for the Government at appellant's trial. Judge Owens accepted White's plea, and White submitted to an interview by agents of the DEA.

During the interview, the agents asked White where he got the funds to hire his attorney, Mr. Botts; they did so because the pretrial services report prepared by the district court's probation office to aid the court in deciding whether, and on what conditions, to admit the defendants to bail indicated that neither defendant had the resources to hire an attorney. White told the agents that he did not know who had paid Mr. Botts and, moreover, that Botts would not tell him. Following the interview, one of the agents approached Botts on the subject, and Botts said that appellant's lawyer had paid him. Given these revelations, the Government concluded that a third party, probably the organizer or the

financier of the drug-trafficking syndicate, had hired both Botts and Coleman and that appellant might not have conflict-free counsel. The Government therefore moved the court for an emergency hearing on the matter; among other things, the Government asked the court to set aside White's guilty plea, to determine the source and the amount of the fees that had been paid to Botts and Coleman, and, following a Federal Rules of Criminal Procedure 44(c) inquiry,[2] to ensure that the defendants had counsel capable of providing them effective, conflict-free assistance as required by the sixth amendment. The Government filed its motion for an emergency hearing on March 16; Judge Owens held the hearing on March 17 (on Friday), three days before appellant's trial was to begin (on Monday). (Sometime before the hearing began, White withdrew the guilty plea he had entered on March 15 pursuant to a plea agreement with the Government and, proceeding without a plea agreement, tendered a plea of guilty to each count of the indictment.

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[2]Fed.R.Crim.P. 44 provides:

Rule 44. Right to and Assignment of Counsel

(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate or the court through appeal, unless that defendant waives such appointment.

(b) Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Although the record of this proceeding is not before us, it is apparent from what is before us that Judge Owens accepted the plea.)

The hearing on the Government's motion began at 9:00 a.m. in Judge Owens' chambers; present were Judge Owens and attorney Botts. Referring to the Government's allegation that appellant's attorney had paid Botts to represent White, Judge Owens said that he had a duty to inquire as to whether, if the Government's allegation were true, Mr. White had been receiving conflict-free counsel. Judge Owens began his inquiry by asking Botts, over Botts' objection, to reveal who had hired him to represent White and how much that person had paid him. Botts stated that he undertook White's representation after being contacted by Coleman; Coleman asked him to represent White—for a fee of $25,000—and he accepted the assignment. He received the fee in installments. First, Coleman paid him $10,000. Then, Schwartz paid him $5,000. The final payment, $10,000, came from a man who identified himself to Botts' secretary as "Mr. Brown" and said that he had come to Botts' office "to pay the remainder of Mr. White's fee." Botts said that he told Mr. Brown that he would have to have his full name, so that he could "file reports on it," and Brown replied: "Well then, you can write my name down as Frank Smith and I don't want a receipt." According to Botts, "that was it," and Brown gave him $10,000 in cash.

At this point, the court excused Botts, and Coleman entered Judge Owens' chambers—to face the same inquiry. Coleman, after objecting to the questions that he anticipated the court would ask, said that he agreed with a man (whose name he did not reveal), who hired him, that he would represent appellant for $20,000, and that he had received $9,300 of that amount. Coleman also said that the man who hired him gave him $10,000 to pay Botts (the initial

installment of the fee Botts was to receive for representing White), and that he, in turn, gave the money to Botts.

After questioning Coleman, Judge Owens excused him and examined appellant and White separately, beginning with White. Judge Owens explained that the purpose of the inquiry was to ensure that White had effective, conflict-free counsel. He told White that, according to the information he had received from counsel, White's "lawyer had been . . . selected [and paid for] by someone else, that . . . Mr. Coleman was contacted by a third person, he [Coleman] came to Macon and talked to both you and your codefendant and found that he couldn't represent both of you, so then he went and asked Mr. Botts to come and represent you." White responded that such was the case. After ensuring that White understood why an accused needed conflict-free counsel—so that counsel could provide the accused the effective representation the Constitution requires—and after White stated that he felt "very confident" with Mr. Botts' representation, Judge Owens ended the inquiry.

After excusing Mr. White, Judge Owens called appellant to his chambers. He told her why she was there—so that he could determine whether she had conflict-free counsel who could give her the representation the Constitution required—and she said she understood. Judge Owens asked her who had hired and paid her attorney, Coleman; she replied that her family had done so. She denied that Coleman had been hired and that his fees had been paid by someone in Miami, insisting, over and over, that her "family" had hired Coleman. Judge Owens, obviously disbelieving her, told her that if she wanted to discharge Coleman and lacked the funds to hire a new attorney, the court would relieve Coleman and provide her counsel. Appellant said that she wanted Coleman to continue; "right now, I'd like to keep him because he's familiar with me and

my case." Judge Owens, apparently satisfied with her answer, concluded the inquiry.

At this point, Judge Owens had the prosecutors (Fowler and Calhoun) and defense counsel (Coleman and Botts) brought to his chambers. He told them that he did not "perceive at the moment any necessity for the court to relieve [Coleman or Botts] or making any change" in the defendants' representation. Then, he turned to the question of whether Coleman's and Botts' fees constituted the proceeds of drug trafficking and therefore ought to be deposited in the registry of the court. He raised the question because experience had taught him that south Florida drug traffickers frequently arrange to hire attorneys to represent those in their organizations who happen to get arrested. Judge Owens deferred resolution of the question, however, and concluded the session by stating that "if it turns out that the money that you [Coleman and Botts] have been paid is forfeitable, then the Court will cause you to be compensated under the Criminal Justice Act."

Following this chambers conference (actually sometime after the lunch hour), Judge Owens called attorney Schwartz in Miami. The court reporter took down the conversation that ensued. Judge Owens told Schwartz that he had learned from counsel that Schwartz had paid all or a part of Botts' fee for representing White. Schwartz, in response, said that, after appellant's and White's arrests, he had gone to Georgia to see Coleman (who had once clerked for Botts). Coleman had already gotten Botts into the case. Schwartz then met with Botts. Botts said that Coleman had paid him only part of his fee and he wanted the rest. Schwartz said that he did not know where Coleman got the money to pay Botts. Schwartz added that the "gentleman [who] came to me and . . . paid my fee . . . also said . . . 'here is $5,000 for Mr. Botts.'" Schwartz told the gentleman that he was not the one who had retained Botts to represent White, but that he

would pass the money along to Botts. He thereafter mailed Botts his, Schwartz', check for $5,000. Schwartz told Judge Owens that he had never instructed Botts on how to handle White's defense; all that he did was to act as a conduit for the payment of part of Botts' fee.

Judge Owens asked Schwartz how much he had been paid. Schwartz said that he received "$5,000 for expenses for me to go to Georgia, meet with Mr. Coleman, find out what the case was about and ascertain whether I felt I could come in and represent the gentleman." On a second occasion, he "received $15,000 of which $5,000 was sent to Mr. Botts so that brought me to a total receipt of $15,000 for myself. I received in addition to that another $10,000. . . . So I have received a total of $25,000. . . ."

Schwartz told Judge Owens that he perceived no conflict that would preclude him from representing appellant. Judge Owens replied that "because of the potential for conflict [he was] required to disqualify [him] from further participation in the matter." He said that he would notify appellant of his ruling.

At 4:30 p.m. that day, Judge Owens had appellant brought to his chambers. He told her that he had spoken with Schwartz and learned that Schwartz had "transmitted and paid money, part of the fee in question, to both [her] lawyer [Coleman] and [White's] lawyer, and that the money came from somebody who stopped in [Schwartz'] office in Miami." Judge Owens then asked appellant when she first heard of Schwartz. "Was it after Mr. Coleman saw you? How long was it before you even heard from Mr. Schwartz?" Appellant said: "Well, I just understand that he was working with Mr. Coleman, kind of introductory." Judge Owens told appellant that "because of the fact that Mr. Schwartz is in Miami and received money from somebody, unknown to the court, which he has sent part of to each lawyer [Coleman and

Botts] . . . there is the danger that Mr. Schwartz has [an] obligation to somebody other than you; that whatever decisions he might make as a lawyer in your case could possibly be influenced by thinking of somebody other than you." For this reason, Judge Owens explained, he had advised Schwartz that he could not represent appellant at her trial. He told her that if she felt that Coleman could not "adequately handle" her case, he would obtain substitute counsel for her. Appellant, responding, said: "Well, as I told you this morning, I'll stick with Mr. Coleman. . . ."

After conferring with appellant, Judge Owens met with Coleman and related his conversation with appellant and Schwartz. Coleman told the judge that he was not prepared for trial, that "Schwartz was to have been lead counsel," and that he was going to appeal the ruling disqualifying Schwartz. Coleman also indicated that if Judge Owens did not postpone the trial, he would ask this court to stay further proceedings in the case pending its disposition of the appeal.

Judge Owens refused to postpone trial and, after observing that the disqualification of Schwartz was not appealable, told Coleman that the case would proceed to trial as scheduled. The trial began the following Monday, March 20, and, on March 22, the jury found appellant guilty as charged.

Appellant contends that the trial court committed reversible error when it disqualified Schwartz. According to appellant, the disqualification deprived her of her sixth amendment right to counsel of her choice. She contends, in addition, that even if the court was correct in finding that Schwartz had a conflict of interest, the court denied her the right to waive the conflict.

[3] The sixth amendment right to counsel does not give an accused the right to subvert the judicial process. *See United States v. Sexton*, 473 F.2d 512, 514 (5th Cir.1973). *Cf. United States v. Dinitz*, 538 F.2d 1214, 1219–20 (5th Cir.1976) (en banc), *cert. denied*, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (1977). In this case, as we observed in rejecting appellant's argument that the evidence was insufficient to convict, it is obvious that appellant and White were working as interstate couriers for a large drug-trafficking syndicate—hauling substantial quantities of cocaine from south Florida to Atlanta. It is also obvious that those running the syndicate hired Mr. Schwartz, Mr. Coleman, and Mr. Botts. As Judge Owens observed, the arrangement had a certain "odor" about it. The inference is inescapable that the syndicate provided appellant and White counsel because they wanted to "control" them—to prevent them from cooperating with the Government and revealing the identities of those in the syndicate who gave them their marching orders. Such control can be devastating to the rights of an accused; rather than getting credit through a charge bargain with the prosecutor or a reduced sentence from the trial judge, the accused stands mute and takes all the blame.

[4] Judge Owens' findings of fact—both explicit and implicit—are firmly rooted in the record; thus, we do not disturb them. What is left for us to decide is whether the trial judge—to ensure the appearance of justice, if not justice itself—abused his discretion in disqualifying Schwartz, who had filed an appearance in the case as Coleman's co-counsel, or in refusing to let appellant waive the conflict manifest in Schwartz' obvious allegiance to the Miami "gentleman" who hired him. It requires no citation of authority for us to conclude that the judge did not abuse his discretion—that he did not deny appellant her sixth amendment rights.

Appellant received a fair trial at the hands of her Mr. Coleman—the lawyer appellant told Judge Owens she wanted to "keep . . . because he's familiar with me and my case." Her conviction is, therefore,

AFFIRMED.

[FILED MARCH 17, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CRIMINAL NO. 89-9-MAC (WDO)

UNITED STATES OF AMERICA

vs.

CLARA DAVIS a/k/a
ANNA LOU STUCKEY, et al.,

Defendants.

O R D E R

Pursuant to a motion filed by the United States, this court has conducted "in chambers" hearings regarding the representation of certain defendants in the above-captioned case. As a result of those hearings, this court hereby ORDERS that Mr. Fred A. Schwartz, Esq., must be immediately disqualified from further participation in this matter. The reasons for such disqualification have been articulated in a telephone conversation involving the court and Mr. Schwartz, a conversation witnessed and recorded by this court's court reporter and capable of transcription if necessary.[1] However, by ORDER of this court, such conversation will not be transcribed, will not be a matter of public record and shall remain SEALED.

SO ORDERED, this 17th day of March, 1989.

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

[1] *See United States v. Padilla-Martinez*, 762 F.2d 942 (11th Cir.1985), *cert. denied*, 474 U.S. 952, 106 S.Ct. 320, 88 L.Ed.2d 302-03 (1985).